CITIBANK N.A.

v.

JONG TZE KHIOK @ YONG TZE KIOK @ JONG TSZ KHIOK & ANOR.

SUPREME COURT, KUCHING
TAN SRI DATUK AMAR HAJI MOHD JEMURI BIN SERJAN CJ (BORNEO),
TAN SRI DATUK EDGAR JOSEPH JR. SCJ,
DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH SCJ
[CIVIL APPEAL NO. 02-450-1991]
2 OCTOBER 1993

LAND LAW: Land charged in return for grant of loan facilities - Default in repayment - Application for order for sale of charged land - Whether notice issued to chargor failed to comply with provisions of Land Code (Cap.81), s. 148(2) - Whether notice was bad in law - Whether there was proper demand.

STATUTORY INTERPRETATION: Whether Court in construing provisions of an Act can allow proviso to the section to exercise an undue influence on the construction of the main section - Whether Court was justified in resorting to legislative history of the provision of a section as aid to its construction where the words in the section are clear and unambiguous.

The appellant granted banking facilities to a customer in return for which the respondents charged their land to the appellant as security. The customer defaulted on repayment and the appellant applied for an order for sale of the charged land under s. 148(2) of the Land Code (Cap. 81) (the Code).

The learned Judge dismissed the application on the grounds that the appellant had not established that there was default in the payment of the principal sum, interest and other moneys secured by the charge and that the notice to the defendants was not a good notice in law on account of non compliance with the proviso to s. 148(3) of the Code.

In dismissing the appellant's application, the learned Judge construed the provisions of s. 148(3) of the Code including its proviso and resorted to the legislative history of the section as an aid to construction. During the course of the hearing of the appeal the parties informed the Court that the matter had been amicably settled and the appeal became an academic exercise only.

Held:

[1] Under s. 148(1) of the Code it is the default and not the demand for the payment under clause 1 of the charge that triggers off the right of the plaintiff to issue the notice in writing. Such notice is not intended for the purpose of demanding payment of the amount due to the plaintiff but to notify the chargor that the plaintiff would resort to s. 148(2)(c) of the Code for an order for sale of the charged land unless such default is remedied.

[2] It follows therefore that the demand under clause 1 of the charge is not a condition precedent to an action under s. 148. On the contrary it is the default on the part of the defendants to make the payment on demand that constitutes a condition precedent to an application under s. 148(2)(c) of the Code.

[3] The period of notice was categorically and unequivocally stipulated in the charge to be 14 days and in the light of the clear provisions of s. 148(3), which was complied with in the instant case, such a notice could not but be valid and by no stretch of the imagination or other reasonable process of interpretation could the section be interpreted to require the minimum period of 30 days as decided by the learned Judge.

[4] As the language of s. 148(3) is clear and unambiguous, there was no reason why resort to legislative history of the section was justified because to do so would alter completely the intention of the legislature when it introduced s. 148(3). The proviso to the said section, being intended to operate or have the effect of excepting the main provision only where no period of notice was stipulated in the charge, did not apply in the instant case.

[5] In the result, the notice was valid and effective for the purpose of s. 148(2)(c) of the Code. Any other construction of the provision of s. 148(3) of the Code would do violence to the clear and unambiguous language employed in the subsection and render it meaningless.

[Appeal allowed with costs].

[Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG TANAH: Tanah digadaikan sebagai balasan kepada pemberian kemudahan pinjaman - Kemungkiran pembayaran - Permohonan bagi perintah jualan akan tanah yang digadaikan - Sama ada notis yang

dikeluarkan kepada penggadai gagal mematuhi peruntukan Kanun Tanah (Bab. 81), s. 148(2) - Sama ada notis tidak baik dari segi undang-undang - Sama ada terdapat tuntutan yang wajar.

PENTAFSIRAN STATUTORI: Sama ada Mahkamah dalam mentafsirkan peruntukan sesuatu Akta boleh membenarkan proviso kepada seksyen untuk mengamalkan pengaruh yang tak wajar ke atas pentafsiran seksyen utama - Sama ada Mahkamah berjustifikasi dalam beralih kepada sejarah perundangan akan peruntukan sesuatu seksyen sebagai membantu tafsirannya di mana perkataan-perkataan di dalam seksyen berkenaan adalah jelas dan tidak samar-samar.

Perayu telah memberikan kemudahan-kemudahan urusan bank kepada seorang pelanggan dan sebagai balasannya responden-responden menggadaikan tanah mereka kepada perayu sebagai jaminan. Pelanggan telah memungkiri pembayaran balik dan perayu memohon untuk perintah menjual tanah yang digadaikan tersebut di bawah s. 148(2) Kanun Tanah (Bab 81) (Kanun tersebut).

Hakim yang bijaksana telah menolak permohonan berkenaan atas alasan bahawa perayu tidak membuktikan bahawa terdapat kemungkiran dalam pembayaran jumlah wang prinsipal, faedah dan lain-lain wang yang dijamin oleh gadaian tersebut dan bahawa notis kepada defendan-defendan tidak merupakan notis yang baik dari segi undang-undang kerana tidak mematuhi proviso s. 148(3) Kanun tersebut.

Dalam menolak permohonan perayu, Hakim yang bijaksana tersebut telah mentafsirkan peruntukan s. 148(3) Kanun tersebut termasuklah provisonya dan beralih kepada sejarah perundangan akan seksyen tersebut sebagai bantuan kepada tafsiran. Semasa perbicaraan rayuan berkenaan, pihak-pihak tersebut memberitahu Mahkamah bahawa perkara berkenaan telah diselesaikan secara baik-baik dan rayuan tersebut menjadi suatu amalan akademik sahaja.

Diputuskan:

[1] Di bawah s. 148(1) Kanun tersebut kemungkiran dan bukannya tuntutan bagi pembayaran di bawah fasal 1 gadaian tersebut yang membuatkan Plaintif berhak untuk mengeluarkan notis bertulis tersebut. Notis sedemikian tidak dimaksudkan untuk tujuan menuntut pembayaran akan jumlah wang yang patut dibayar kepada Plaintif tetapi untuk memaklumkan pemegang gadaian bahawa Plaintif akan beralih kepada s. 148(2)(c) Kanun tersebut untuk perintah menjual tanah berkenaan melainkan kemungkiran sedemikian diremedikan.

[2] Oleh yang demikian tuntutan di bawah fasal 1 gadaian tersebut bukan merupakan syarat duluan kepada sesuatu tindakan di bawah s. 148. Sebaliknya, kemungkiran oleh defendan-defendan untuk membuat pembayaran atas tuntutan yang menjadi suatu syarat duluan kepada sesuatu permohonan di bawah s. 148(2)(c) Kanun tersebut.

[3] Tempoh notis tersebut dengan khususnya dan jelas sekali ditetapkan di dalam gadaian tersebut sebagai 14 hari melihat kepada peruntukan-peruntukan nyata akan s. 148(3), yang telah dipatuhi dalam kes semasa ini, notis sedemikian tentulah sah dan seksyen tersebut tentulah tidak melalui imaginasi yang luas atau melalui proses pentafsiran lain yang munasabah ditafsirkan sebagai menghendaki tempoh minima 30 hari sebagaiman yang diputuskan oleh Hakim yang bijaksana tersebut.

[4] Memandangkan kata-kata s. 148(3) adalah jelas dan tidak samar-samar, tiada sebab mengapa harus beralih kepada sejarah perundangan akan seksyen tersebut dijustifikasikan kerana untuk berbuat sedemikian akan mengubah sepenuhnya maksud perundangan tersebut apabila ia memperkenalkan s. 148(3). Proviso kepada seksyen tersebut, dimaksudkan untuk berfungsi atau mempunyai kesan untuk menjangkakan peruntukan utama sahaja di mana tiada tempoh mengenai notis ditetapkan dalam gadaian tersebut, tidak terpakai dalam kes semasa ini.

[5] Hasilnya, notis tersebut adalah sah dan berkesan bagi maksud s. 148(2)(c) Kanun tersebut. Sebarang pentafsiran lain akan peruntukan s. 148(3) Kanun tersebut akan memusnahkan kata-kata nyata dan jelas yang digunakan di dalam subseksyen tersebut dan mebuatkannya sebagai tidak bermakna.

[Rayuan dibenarkan dengan kos].

Cases referred to:

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Bhd. [1989] 2 CLJ 148 / [1989] 3 MLJ 155 ***(refd)***

Mok Hin Wah & Ors. v. United Malayan Banking Corporation Bhd.[1987] CLJ 197 / [1987] 2 MLJ 610 ***(refd)***

The Guardians Of The Poor Of The West Derby Union v. The Metropolitan Life Assurance Society & Ors. [1897] AC 647 ***(foll)***
Corporation of the City of Toronto v. Attorney-General for Canada [1946] AC 32 ***(refd)***
Hadmor Productions v. Hamilton [1983] AC (HL(E)) 191 at p. 229 ***(refd)***
The Queen v. Titterton [1895] 2 QB 61 at p. 67 ***(refd)***
Beswick v. Beswick [1968] AC (HL(E)) 58 at p. 73 ***(refd)***

Legislation referred to:
F.M.S. Cap. 138, s. 138(i)(a)
Land Code (Cap. 81), ss. 148(1), (2)(c), (3), 208
Land Ordinance (Cap. 27), ss. 60 & 61 (repealed)
Land Settlement Ordinance (Cap 28), s. 45 (repealed)
Rules of the High Court 1980, O. 83

Other sources referred to:
Craies on **Statute Law**, 7th Edn.,
Halsbury's Laws of England, 4th Edn., Vol. 44, Paragraphs 857, 863, 864 & 881

For the appellant - David C.C. Lim; M/s. Wan Ullok, Jugah, Chin & Co.
For the respondents - K.Y. Lin; M/s. Wong, Lin & Co.

JUDGMENT

Haji Mohd Jemuri bin Serjan CJ (Borneo): At the hearing of this appeal on 18 May 1993 we allowed the appeal with costs here and below and ordered the deposit to be refunded to the appellant, and indicated that we would give our reasons later. These are the grounds of our judgment.

In this case the 1st and 2nd defendants (the Respondents), Jong Tze Khiok @Yong Tze Kiok @ Jong Tsz Khiok and Yong Ng Fah, the registered proprietors of the land described as Lot 535, Block 9, Miri Concession Land District, charged the said land as security for banking facilities granted by Citibank N.A., the plaintiff (the Appellant), at the request of the defendants, to Yong Tze Kiok Co. Sdn. Bhd., the customer, up to an aggregate total amount not exceeding Brunei Dollars Two Million (BD2,000,000) only (the principal sum). According to the terms of the charge the defendants promised to pay the principal sum upon and only upon demand, and similarly the balance, which at the date of such demand was still owing to the plaintiff by the customer together with interest at the rate of 2% above the prime rate, was also to be paid upon and only upon demand.

The customer having defaulted the plaintiff took out an originating summons for an order for sale of the charged land under s.148(2) (c) of the Land Code (Cap. 81). In support of the originating summons the Vice-President of Citibank N.A., Encik Cheng Hock Kian, by an affidavit affirmed on 12 September 1989 asserted that the appellant advanced by way of letters of credit a total sum of BD222,716.53 and granted and/or continued to grant overdraft facilities as well. The principal amount outstanding on the letters of credit as at the 28 February 1989 was BD195,596.03 and the amount of interest in arrears was BD30,462.59, making a total outstanding of BD226,058.62 and the amount of interest charged on the said facility per day is BD38.84. The principal amount outstanding in respect of the overdraft facility as at the 28 February 1989 was BD2,696,534.29 while the amount of accrued interests on the overdraft facility was BD570,147.83. The total amount of the principal sum with accrued interest outstanding is BD3,492,740.74.

The 1st defendant, on behalf of himself and the 2nd defendant, filed two affidavits in opposition and raised several issues some of which were irrelevant. What clearly emerged from his affidavits was the admission by the 1st defendant that he and the 2nd defendant were shareholders of Yong Tze Kiok Company Sdn. Bhd. and that the 1st defendant was the Managing Director of that company. At the hearing in the High Court, Counsel for the parties, however, agreed to submit for the determination of the Court only three issues which they contended to be relevant to the application for the order under s. 148(2)(c). The three issues are:

(1) that the Notice Ex. CHK - 3 failed to comply with s. 148 of Cap. 81;
(2) that there was failure to serve such notice in accordance with s. 208 of Cap 81; and,
(3) that such notice was confusing, that is to say, whether it was meant for the customer or for the chargors.

Having heard and considered the submissions of Counsel for both parties, his Lordship dismissed the application on the grounds that the plaintiff had not established that the defendants defaulted in payment of the principal sums, interests and other monies secured by the said charge, and that the notice to the defendants was not a good notice in law on account of non compliance with the proviso to s.148(3) of the Land Code. The learned Judge found favour with the defendants' contention and so ruled accordingly. The relevant passage of the

judgment for the purpose of convenience is hereby reproduced:

> ... The proviso must be read as fixing a minimum statutory period of 30 days' notice to be given, and if more (but not less) than 30 days' notice to be given, it must be expressly stipulated as a term of the charge in which case the notice to be given shall comply with the terms of the charge as provided in s. 148 (3) of Cap. 81.
>
> As I have said before, it is not possible for the chargee and the chargor to stipulate a period less than the statutory minimum of 30 days for the notice to be given, it follows that insofar as clause 2 of Ex. CHK - 1 purports to contract out of the proviso to s. 148(3) of Cap. 81, it does not succeed and has no legal force or effect. The legal position then is as if no period of notice is stipulated in the charge and the statutory minimum of 30 days' notice stipulated by the proviso to s. 148 (3) sticks. That being the view I take, insofar as paragraph 4 of Ex. CHK - 3 gives only fourteen days' notice to the chargor, it is sixteen days short of the statutory minimum of 30 days and has therefore not complied with the proviso to s. 148 (3) of Cap. 81. In the premises, I hold that the notice in Ex. CHK - 3 is not good in law.
>
> Since the plaintiff has not established that the defendant defaulted in payment of the principal sum, interest and other moneys secured by the charge in Ex. CHK - 1 and further that the notice in Ex. CHK - 3 given by the plaintiff to the defendants is not good in law, I cannot say that I am satisfied in those circumstances that the plaintiff's power of sale arose or became exerciseable so as to justify an order of sale to be made of the charged land and consequently, I decline to make such order. For the reasons given, I dismiss the plaintiff's application with costs to the defendants to be taxed.

In the course of the arguments we were informed that the matter had been amicably settled and that the appeal before us became an academic exercise only. The crucial issue that called for our determination was on the first issue whether 14 days' notice as stipulated in the charge was valid in law, having regard to the provisions of s. 148. It was clear from the passage of the judgment on this issue that his Lordship's reasoning was redolent of an action founded on a guarantee where service or notice of demand was not made in accordance with the terms of the guarantee and highlighted in cases such as *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Bhd.* [1989] 3 MLJ 155 and *Mok Hin Wah & Ors. v. United Malayan Banking Corporation Bhd.* [1987] 2 MLJ 610 where it was held that demand was a condition precedent to a suit to claim money lent. In our view the analogy drawn from cases based on action under a guarantee is not appropriate. An action under O. 83 of the Rules of the High Court 1980 for sale of charged property is derived from the provisions of s. 148 (2) of the Land Code whereas an action under a guarantee is based on the law of contract, and in the case of the former one has to look at the provisions of s. 148 of the Land Code to determine under what circumstances the plaintiff's right to apply for the order would arise, and in the process the terms of the charge have also to be considered. All the authorities on demand or service of demand in an action under a guarantee to claim payment of money lent or facilities granted have no application and are irrelevant, in our view, to a charge action under O. 83 in conjunction with s. 148 of the Land Code.

The relevant clause in the charge dealing with demand is clause 1 and reads as follows:

> 1. DEMANDS. Any demand for payment of the monies intended to be hereby secured may be made in writing requiring payment within seven (7) days from the date of demand and may be signed on behalf of the Bank by the Manager Assistant, Manager Sub-Manager Accountant or any other officer of the Bank or by any advocate or firm of advocates acting for and on behalf of the Bank and such notice shall be deemed to have been sufficiently served on the chargor/customer if it is left at or sent by registered mail to the address or addresses of the chargor/customer above written. If the demand is sent by registered mail it shall be deemed to have been served at the time when the registered letter would in the ordinary course of events be delivered.

Clause 2 which deals with default and statutory notice is hereby reproduced:

> 2(1) DEFAULT AND STATUTORY NOTICE. In the event of the Chargor failing to make payment upon demand as hereinbefore stated or failing or refusing to observe perform carry out or act on any of the terms covenants stipulations and conditions on the part of the chargor herein contained or in the event of the chargor committing an act of bankruptcy or if a petition shall be presented or an order made or a resolution passed for winding up the chargor or in the event of the customer failing to operate actively the account for which this

charge has been created to the satisfaction of the Bank or strictly within the limit of the principal sum which shall include the computation of interest then notwithstanding any rule or law to the contrary it shall only be necessary for the Bank to give fourteen (14) days' notice in writing to the chargor to entitle the Bank to resort to all the Bank's rights and remedies under the Land Code (Cap 81) as a result of the breach. Service of such notice shall be effected in the same manner as a notice demanding payment of the balance due as hereinbefore provided.

Having considered the demand clause in the charge, the learned Judge came to the following conclusion:

It is plain from the recital of the consideration quoted that demand is a condition precedent to be fulfilled by the Bank before the principal sum or the balance thereof plus interest thereon and other moneys becomes due and payable. By clause 1 of Ex. CHK - 1, such demand had to be in writing requiring payment within seven days from the date thereof and served on the Chargor/Customer. If the chargor/customer fails to make payment within the seven days period pursuant to such notice of demand issued, then only may the Bank give fourteen days' notice to the chargor to entitle it to resort to all the Bank's rights and remedies under Cap. 81 as a result of the breach. Quite clearly, the notice of demand issued under clause 1 is an important document that must be exhibited to P's Affidavit No. 1 or No. 2 which is not so exhibited and Mr. KY Lin quite appropriately drew this point to my attention at the hearing. It is an issue of fact whether such notice of demand was ever issued under clause 1 by the Bank to the chargor/customer after execution by the parties of Ex. CHK - 1. That issue is for the plaintiff to establish which it has not proved. Mr. David Lim will no doubt say but paragraph 3 of Ex. CHK - 3 expressly stated that repeated demands were made by his client (the Bank). I am not satisfied that that is proof enough. The point is, assuming that repeated demands were made, were they made under clause 1 of Ex. CHK - 1 after execution thereof by the parties. Only the plaintiff can answer that truthfully and no explanation is given for the omission or failure to exhibit it in any of the plaintiff's affidavits filed. The notice of demand under clause 1 is important because only upon its issuance to and service on the chargor/customer, the principal sum or its balance plus interest thereon and other moneys secured by Ex. CHK - 1 become due and payable and, if it is not paid to the Bank after the seventh day of the date thereof, then the chargor will have defaulted in the payment in terms of s. 148 (1) of Cap. 81 and the Bank will have been justified to issue the requisite notice in writing under that section. In the premises I hold that the plaintiff has not established that the defendants have defaulted in the principal sum, interest and other moneys secured by Ex. CHK - 1. Without such notice of demand under clause 1 shown to the Court Ex. CHK - 3 is purportedly issued.

At this juncture we must point out that the question whether proper demand was made or not was not canvassed before his Lordship nor before us although it was raised in the affidavit of the 1st defendant, and since the learned Judge had made a decision on this it would be proper for us to address ourselves on this issue.

Under s. 148 (1) it is the default and not the demand for the payment under clause 1 of the charge that triggers off the right of the plaintiff to issue the notice in writing. Such notice is not intended for the purpose of demanding payment of the amount due to the plaintiff but to notify the chargor that the plaintiff would resort to s. 148(2)(c) for an order for the sale of the charged land unless such default is remedied. Only, and only if the chargor fails to comply with the requirements of the notice, the plaintiff has the liberty to apply to the High Court for such order. Subsections (1) and (2) of section 148 read:

148(1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns notice in writing that the chargee will resort to all available remedies unless such default be remedied.

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court -

(a) ...
(b) ..., or
(c) for the sale of the charged land,

and the Court after hearing the evidence may make such order as the circumstances seems just.

Clearly the steps to be taken by the plaintiff could briefly be stated, thus:

(1) The chargee must make a demand under the charge for the payment of the amount, due to him;

(2) Only where the chargor fails to make payment after having been served with the notice of demand under clause 1 of the charge that notice under s. 148(1) may be issued;
(3) Where the chargee fails to comply with the requirements of the notice then the chargee's statutory right to apply for an order for sale of the charged land is activated.

It follows, therefore, that the demand under clause 1 of the charge is not a condition precedent to an action under s. 148. On the contrary, it is the default on the part of the defendants to make the payment on demand that constitutes a condition precedent to an application under s. 148(2)(c).

Coming back to the first issue as agreed by the parties, it is also clear from the passage of the judgment adverted to above that the determination of this issue revolves around the proper construction of s. 148 (3), including its proviso. It was also obvious that the learned Judge, having agreed with the Counsel for the defendants' contention, was of the view that in order to arrive at the correct construction of the section resort to, as aid to construction, the legislative history of s. 148(3) was necessary. Thus, the Court engaged itself in the construction of s. 148(3) with the discussion of sections 60 and 61 of the repealed Land Ordinance (Cap. 27), and s. 45 of the repealed Land Settlement Ordinance (Cap. 28) as well as s. 138 (i) (a) of F.M.S. Cap. 138 where the period of notice of not less than 30 days was provided.

It would appear to us that two relevant questions ensue from the decision on this point. Firstly, can the Court in construing the provisions of an Act allow the proviso to the section to exercise an undue influence on the construction of the main section, and secondly whether the Court is justified to resort to legislative history of the provision of a section as aid to its construction where the words in the section are clear and unambiguous? The learned Counsel for the defendants in the High Court apparently succeeded to persuade his Lordship to agree with his contention that both questions should be decided in his favour although on the authorities such contention could not be sustained.

With respect, we do not agree with the method of construction employed by Counsel for the defendants and agreed to by the learned Judge. In respect of the first question, the matter has been settled and dealt with adequately by Lord Watson in *The Guardians Of The Poor Of The West Derby Union v. The Metropolitan Life Assurance Society & Ors.* [1897] AC 647. At page 652 his Lordship said:

> ... but I am perfectly clear that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one regards the natural history and object of provisos, and the manner in which they find their way into Acts of Parliament, I think your Lordships would be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the statute, although I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light upon the ambiguous import of statutory words. I therefore concur in the judgment which has been moved.

According to Craies on **Statute Law**, 7th Edn., the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect.

Lord MacMillan had occasion to address the Privy Council on the role of the proviso in a section in the case of *Corporation of the City of Toronto v. Attorney-General for Canada* [1946] AC 32. At page 37 he had this to say:

> ... The purpose of the enactment is to give to the provincial treasurers the fines imposed in their provinces other than those which are expressly appropriated to the Dominion Minister of Finance. But for the proviso fines imposed in the province of Ontario, with the stated exceptions, would have been payable to the treasurer of the province - not all fines, be it observed, but all fines other than those expressly excepted. The proviso qualifies the generality of the main enactment by providing that in the special case of the Province of Ontario those fines, which would otherwise have gone to the provincial treasurer shall go to the municipal or local authority which bears the expense of administering justice. It would

> be foreign to the proper function of a proviso to read this proviso as providing that in Ontario not only those fines which the main enactment gives to provincial treasurers should go to the municipal or local authority but also those fines which the main enactment has expressly said shall not be given to provincial treasurers.

It seems obvious in the instant case that the High Court allowed the proviso to play the prominent role in the process of construing s. 148(3) and thus control the construction of the main subsection (3) in the face of the authorities cited above. Unfortunately, these cases were not cited in the High Court although **Halsbury's Laws of England,** 4th Edn., Vol. 44, paragraphs 857, 863, 864 and 881 were cited before us. Perhaps, the learned Judge would have arrived at a contrary decision had the authorities been placed before him for his consideration.

On the resort to legislative history as an aid to construction of a statutory provision, Lord Diplock in *Hadmor Productions v. Hamilton* [1983] AC (HL(E)) 191 at p. 229, said:

> My Lord, I think that the meaning of the words in s. 13(1) and (2) in their application to the facts in the instant case is too plain and unambiguous to justify resort to legislative history; ...

Similarly, Lord Russell CJ in The *Queen v. Titterton* [1895] 2 Q.B 61 at p. 67 observed:

> ... The duty of the Court when called upon to construe an Act of Parliament is, I conceive, to read the Act itself, and if its language is clear to give effect to what the legislature has said. It is to my mind proper to refer to earlier Acts in *pari materia* only where there is ambiguity ...

Lord Reid also said something to that effect in *Beswick v. Beswick* [1968] AC (HL(E)) 58 at p. 73 when he said:

> In construing any Act of Parliament we are seeking the intention of Parliament and it is quite true that we must deduce that intention from the words of the Act. If the words of the Act are only capable of one meaning we must give them that meaning no matter how they got there but if they are capable of having more than one meaning we are, in my view, well entitled to see how they got there ...

As the language of s. 148(3) of the Land Code are clear and unambiguous we see no reason why resort to legislative history of the section was justified because to do so would alter completely the intention of the legislature when it introduced s. 148(3).

In order to appreciate the purport of s. 148(3) in this judgment, it is reproduced:

> (3) The notice under subsection (1) shall comply with the terms of the charge:
>
> Provided that, without prejudice to subsection (4) of s. 145, if no period of notice for the purposes of this section is stipulated by the charge, not less than thirty days' notice shall be given.

Obviously, one has to look at the terms of the charge to ascertain and determine the period of the notice since subsection (3) provides that the notice shall comply with the terms of the charge. The relevant terms of the charge relating to notice is to be found in clause 2(1) already referred to above. The period of the notice was categorically and unequivocally stipulated to be 14 days, and in the light of the clear provisions of subsection (3) which was complied with in the instant case, such a notice could not but be valid, and by no stretch of the imagination or other reasonable process of interpretation could the section be interpreted to require the minimum period of 30 days. We do not perceive any reasons why under the circumstances it was incumbent upon the High Court to seek the aid of the proviso or the legislative history of the section to arrive at the correct construction of the subsection. Clearly, there is no ambiguity in the wording of s. 148(3) to justify any resort to aid to construction of the subsection. The proviso, being intended to operate or have the effect of excepting the main provision only where no period of notice was stipulated in the charge, did not therefore apply in the instant case. In the result, the notice, in our view, was valid and effective for the purpose of subsection (2)(c). Any other construction of the provision of s. 148 (3) would do violence to the clear and unambiguous language employed in the subsection and render it meaningless.

The other two issues were not argued before us and neither were they dealt with by the High Court. In any case, the issues are not worthy of any consideration since in fact the first and second issues seem to be a contradiction in terms and the third issue was answered by the 1st defendant in his own affidavit where he averred that he and the 2nd defendant were the shareholders and that he himself was the

General Manager of the customer company. Surely, service on him would be sufficient service on the company.

We would for these reasons allow the appeal with costs here and below. The deposit is to be refunded to the appellant.

KANDIAH PETER A/L KANDIAH

v.

PUBLIC BANK BHD.

SUPREME COURT, IPOH
TUN DATO' SERI HAJI ABDUL HAMID BIN HAJI OMAR LP, TAN SRI DATO' MOHD EUSOFF BIN CHIN SCJ, DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH SCJ
[CIVIL APPEAL NO. 02-534 OF 1991]
28 OCTOBER 1993

PRACTICE & PROCEDURE: Foreclosure proceedings - Chargor raising issues and relying upon facts to show "cause to the contrary" - Order for sale granted - Chargor bringing action seeking declaration that charges and annexures null and void and for consequential relief - Chargor raising issues and relying upon facts identical to those raised in foreclosure proceedings - Whether doctrines of issue estoppel or cause of action estoppel or res judicata applicable to bar chargor's action.

The appellant had charged certain lands to the respondent. The respondent applied for orders for sale of the appellant's lands which application was granted. The appellant unsuccessfully applied to set aside one of these orders and, with equal lack of success, resisted the making of the other order.

The appellant subsequently took out a writ action claiming for a declaration that the charges and annexures relating to the lands are null and void and for consequential relief. The trial Judge found as a fact that the issues and facts raised and relied upon by the appellant in his statement of claim were identical to those raised by the appellant in the foreclosure proceedings under s. 256 of the National Land Code 1965 (the Code).

The trial Judge held that the appellant was estopped by *res judicata* from raising in the subsequent action the identical issues which he had raised in the foreclosure proceedings and dismissed the appellant's claim.

Held:

[1] A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the